



Association for Local Telecommunications Services

96-98

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DIRECT DIAL: (202) 466-3046

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RICHARD J. METZGER
GENERAL COUNSEL

June 20, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Regina M. Keeney
Chief, Common Carrier Bureau
Room 500
Federal Communications Commission
Washington, D.C. 20554

Re: Request for Expedited Letter Clarification -- Inclusion of Local Calls to
ISPs Within Reciprocal Compensation Agreements, CC No. 96-98

The Association for Local Telecommunications ("ALTS") respectfully asks you to issue a letter clarifying that nothing in the Commission's Local Competition Order, CC Docket No. 96-98 (adopted August 8, 1996) altered the Commission's long standing rule that calls to an Information Service Provider ("ISP") made from within a local calling area must be treated as local calls by any and all LECs involved in carrying those calls. In particular, ALTS requests clarification that nothing in the Local Competition Order requires this traffic to be handled differently than other local traffic is handled under current reciprocal compensation agreements in situations where local calls to ISPs are exchanged between ILECs and CLECs. This clarification is needed because two large ILECs -- Bell Atlantic and NYNEX -- are refusing to pay CLECs for this traffic under their reciprocal compensation agreements, and at least four other ILECs (Ameritech, SWB, Pacific, and SNET) are threatening similar action.

ALTS requests the Bureau to issue this clarification as quickly as possible because the merits are clear, and because delay would impose two significant burdens. First, this clarification is plainly within the Commission's exclusive jurisdiction.¹ However, two states have now been

¹ The Commission's original preemption of state authority over enhanced services (adopted in Computer II, 77 F.C.C.2d 384 (1980)) was upheld in Computer & Communications Industry Ass'n v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert.

(continued...)

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asked to issue their own clarifications (New York and Connecticut).² The Commission needs to issue a clarification promptly to preclude the jurisdictional confusion that inconsistent state actions could produce.

The second reason why clarification needs to be issued promptly is that contingency concerning the compensation to be paid for this traffic imposes much greater financial uncertainty on new entrants than on incumbents, at a time when new entrants need to raise substantial capital. The ratio of reciprocal compensation revenue relative to end user revenue is much higher for new entrants than for incumbents, thereby making them more vulnerable to unfounded allegations concerning the financial treatment of this traffic.

History of the ISP Rule

The Commission has long held that local calls to ISPs must be treated as local calls by LECs regardless of whether the ISP reformat or retransmits information received over such calls to or from further interstate destinations.³ The underlying facts are simple. Picture a local calling area, with a call going between an end user and an ISP within that area under three different scenarios: first, where a single LEC handles both ends of the call; second, where a CLEC handles one end and an ILEC the other; and

¹(...continued)

denied, 461 U.S. 938 (1983). Its decision not to impose access charges on ISPs was addressed and affirmed in NARUC v. FCC, 737 F.2d 1095, 1137 (D.C. Cir. 1984). And no party has challenged the Local Competition Order concerning its treatment of local calls to ISPs in relation to reciprocal compensation agreements as to either jurisdiction or merits in the appeals of CC Docket No. 96-98 now pending before the Eighth Circuit. The absence of this issue should not be surprising since, as noted below, the Local Competition Order neither altered nor addressed the existing ISP rule in the context of reciprocal compensation agreements.

² The NYPSC Staff has publicly stated its disagreement with this theory (see attached May 29, 1997, letter of Allan Bausback to William Allan).

³ See, e.g., MTS and WATS Market Structure, 97 FCC 2d 682, 715 (1983); Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, 3 FCC Rcd 2631, 2633 (1988).

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third, where an ILEC handles one end and an adjacent ILEC handles the other. In the fourteen years since the Commission originally issued its rule, such calls have been treated as local for the purpose of end user tariffs, for the purpose of separations, and for the purpose of interconnection agreements among LECs under each scenario.

Nothing in the Telecommunications Act of 1996 or in the Commission's implementing rules altered any aspect of this rule. The Commission in its Local Competition Order, CC Docket No. 96-98 (decided August 8, 1996), discussed at length the scope of the interconnection obligations contained in Sections 251 and 252 as they relate to local and interexchange traffic (§§ 356-365; 716-732; 1033-1038). This discussion carefully explained what kinds of traffic can be handled through reciprocal compensation agreements. Nowhere in this extensive discussion did the Commission announce any change in its longstanding rule that calls to ISPs from within a local calling area must be treated as local calls by LECs.

The Commission's NOI in Usage of the Public Switched Network by Information Service and Internet Access Providers (CC Docket No. 96-263, released December 24, 1996, "Internet NOI"), also recounted the long history of its requirement that calls to ISPs from within local calling areas be treated as local calls regardless of the ISP's subsequent handling of the call, and requested comments on whether this policy should be reconsidered in light of contentions about network congestion, inefficient network usage, etc. (§§ 282-290). Nowhere in that discussion did the Commission suggest that its Local Competition Order had somehow altered its long-standing rule in situations where one LEC hands-off local calls to an ISP to another LEC.⁴

⁴ Several LECs in the Internet NOI have acknowledged that local calls to ISPs are among the traffic exchanged between ILECs and CLECs pursuant to reciprocal compensation agreements. Because the inclusion of this traffic within reciprocal compensation agreements creates competition to gain ISP customers, these ILECs assert that the current rules need to be changed (SNET Internet NOI Comments at 10; Rochester petition to the NYPSC in 93-C-0103, filed May 6, 1997). I.e., these ILECs admit this traffic does fall within the scope of reciprocal compensation agreements.

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***The ILECs' New Theory about Local Calls
to ISPs That Are Exchanged With CLECs***

Bell Atlantic and NYNEX now challenge the continued application of the ISP rule under the second scenario discussed above -- where local calls to ISPs are exchanged between ILECs and CLECs.⁵ They do not dispute that calls under the first scenario -- where the ILEC handles both ends -- must continue to be treated as local calls under the Commission's rules, and also be treated as local calls for separations and tariff purposes, but they now contend that identical calls under the second scenario cannot be treated as "local" for the purpose of being included in reciprocal compensation agreements between ILECs and CLECs.

Bell Atlantic and NYNEX claim that local calls to ISPs are "overwhelmingly interexchange, not local", and thus subject to the Local Competition Order's exclusion of interexchange traffic from the scope of reciprocal compensation agreements (BA-NYNEX Joint NOI Comments filed March 24, 1997, at 13). But, as discussed more fully below, these arguments have two fatal flaws:

- The Local Competition Order's exclusion of interexchange traffic from reciprocal compensation agreements is grounded on the need to prevent disruptions in access charge revenues, and the need to protect state authority over local calling areas, neither of which is implicated by local calls to ISPs.
- Bell Atlantic-NYNEX's argument that local calls to ISPs are "overwhelmingly interexchange" deliberately confuses calls that are "interexchange" for the purpose of the Commission's jurisdiction, with

⁵ See BA-NYNEX comments in Internet NOI filed March 24, 1997, at 13-15; see also attached SWB letter. Ameritech's Tim Whiting recently testified that: "I am informed by the Ameritech attorneys who are responsible for Ameritech's agreements with requesting telecommunications carriers under the Act that Ameritech in fact does not provide interconnection for Internet traffic under section 251(c)(2)" (emphasis in original; Petition by Intermedia Communications, Inc. For Arbitration with Ameritech Illinois Pursuant to the Telecommunications Act of 1996, ICC Docket No. 97 AB-002, submitted May 27, 1997, at 6).

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the entirely distinct category of calls that are "interexchange" for the purpose of paying Part 69 access charges. The portion of the Local Competition Order relied upon by Bell Atlantic and NYNEX uses the latter meaning of "interexchange," not the former.

First, the Local Competition Order recognized there are no fundamental cost differences between the transport and termination of interexchange traffic compared to local traffic (at ¶ 1033):

"We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions. Ultimately, we believe that the rates that local carriers impose for the transport and termination of local traffic and for the transport and termination of long distance traffic should converge."⁶

Rather than adopt the jurisdictional definition of "interexchange" urged by Bell Atlantic and NYNEX, the Local Competition Order grounded its approach to the issue of which traffic should be included within reciprocal compensation agreements on the need to preserve existing access revenue flows, and the need to maintain state authority over local calling areas. For example, it ordered that all CMRS traffic not currently paying access charges be included in transport and termination agreements in order to insure this traffic would not be assessed access charges (¶ 1043):

"Based on our authority under section 251(g) to preserve the current interstate access charge regime, we conclude that the new transport and termination rules should be applied to LECs and CMRS providers so that CMRS providers continue not to pay interstate access charges for traffic that currently is not subject to such charges, and are assessed such charges for traffic that is currently subject to interstate access charges."

⁶ See also the discussion of the similarity of costs when UNEs are used for interexchange access services as compared to local services (id. at ¶ 717).

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Obviously, the existing ISP rule is part and parcel of the same "current interstate access charge regime," and the imposition of carrier access charges upon ISPs would be similarly disruptive. Furthermore, states do not have any authority over the rates or calling areas for any information services associated with local calls to ISPs. Consequently, neither of the two fundamental policy considerations implicated in the Local Competition Order's definition of the scope of transport and termination agreements suggest any reason why this traffic needs to be excluded.

Second, Bell Atlantic and NYNEX confuse the jurisdictional nature of these calls with the entirely distinct issue of their status under the access charge regime when they claim such calls are "overwhelmingly interexchange, not local." As a factual matter, an ISP receiving a local call might respond by connecting the end user to a destination over the Public Switched Network in some other telephone exchange (and if it did so using private lines, it would pay the private line surcharge). It is also possible, and much more likely, that any related calls would either be intraLATA or else carried over non-PSN facilities into other telephone exchanges.⁷

While the end points of the related calls may well be "interexchange" for the purpose of determining the Commission's jurisdiction under the Communications Act, the relevant point here is that Commission has ruled that ISPs be treated as end users, meaning that the inbound local call is not "interexchange" for the purposes of its access charge regime. The Local Competition Order employs the second use of this term in excluding "interexchange" calls from transport and termination agreements, so local calls to ISPs (which are "end users" under the access charge system) are not "interexchange" for the purpose of transport and termination agreements.⁸

⁷ See Digital Tornado: The Internet and Telecommunications Policy, OPP Working Paper Series, March 1997, at 15, describing how Internet traffic moves over the NSFNET backbone network.

⁸ In this regard, local calls to ISPs are identical to calls to leaky PBXs, in that they can be linked to subsequent calls to interexchange destinations without altering the regulatory nature of the first call.

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***Discriminatory Treatment of Competitive
LECs in Comparison with Adjacent LECs***

Concerning the third scenario described above -- the exchange of local calls to ISPs between adjacent LECs -- Bell Atlantic and NYNEX are utterly silent. This silence conceals the discriminatory nature of their new theory, because, to the best of ALTS's knowledge, they continue to treat local calls to ISPs that they exchange with adjacent LECs as "local" for the purpose of their interconnection agreements with those companies (as well as for separations and tariff purposes) even though those calls present precisely the same circumstances, legally and economically, as the second scenario.⁹

Indeed, the Local Competition Order expressly held that: "section 251(b)(5) obligations apply to all LECs in the same state-defined local exchange service areas, including neighboring incumbent LECs that fit within this description" (at ¶ 1037, rejecting NYNEX's argument that the reciprocal compensation rules should apply only to competitive entrants, and not to adjacent LECs). By placing all reciprocal compensation agreements under the same regulatory regime, the Order effectively mandates that CLECs be treated the same as other LECs for the purpose of including local calls to ISPs within their reciprocal compensation agreements.¹⁰

⁹ None of the interconnection agreements between adjacent LECs of which ALTS is aware (all of which are to be filed with state agencies no later than June 30, 1997) distinguish between calls to an ISP within a local calling area that are exchanged between LECs, and any other kind of local traffic exchanged between the LECs.

¹⁰ Bell Atlantic and NYNEX's theory also discriminates against ISPs which choose CLEC local service because ISPs choosing ILEC service would continue to enjoy local rates. See, e.g., BA's proposed amendment to its CEI plan to expand its Internet Access Service dated May 5, 1997, CCB Pol. 96-09, at 3: "Bell Atlantic's vendor will subscribe to local telephone services -- either standard business lines or ISDN -- to receive the call." Under competitive conditions, CLECs would have no choice except to pass on any different expenses for the exchange of ISP traffic on to their ISP customers, thereby placing them in a different position than ISPs served by ILECs.

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Bell Atlantic and NYNEX's new theory thus lacks any foundation in law and policy. In particular, it is manifest that if such a fundamental change in the ISP rule had been intended in the Local Competition Order, the Commission would have made some reference to it. Furthermore, even if such a change had been silently accomplished, it would be unlawfully discriminatory for Bell Atlantic and NYNEX to treat the exchange of local calls to ISPs differently under their reciprocal compensation agreements with adjacent LECs than they do under their agreements with competitive LECs.

For all of the above reasons, ALTS respectfully asks you to issue a letter clarification that: (1) calls within local calling areas to ISPs should continue to be treated as local when an ILEC-to-CLEC hand-off is involved for the purposes of tariffs, separations, and reciprocal compensation agreements; and (2) even if such calls were not required to be treated as local, the fact that LECs do treat such calls as local when exchanged with adjacent LECs requires the same treatment when such traffic is exchanged with competitive LECs.

Yours truly,


Richard J. Metzger

cc: Ameritech
Bell Atlantic
Bell South
GTE
NYNEX
SNET
Southwestern Bell
USTA
US WEST

**STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE
THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350**

Internet Address: <http://www.dps.state.ny.us>

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Secretary

May 29, 1997

Mr. William Allan
Vice President
Regulatory Matters
New York Telephone Company
158 State Street
Albany, NY 12207

Dear Mr. Allan:

We have received a number of formal complaints from interconnecting local exchange carriers objecting to New York Telephone Company's (NYT) pronouncement advising carriers that traffic delivered by NYT to interconnecting local exchange carriers for termination to Internet Service Providers is interstate in nature and is not eligible for reciprocal compensation. The interconnecting local exchange carriers were informed of this via letters from Patrick Garzillo dated April 15 and 16, 1997.

Please be advised that the interpretation expressed in NYT's letters has not been approved by the Public Service Commission and is at odds with NYT's own treatment of this traffic as intrastate in its assessment of usage charges to other customers.

As you know, the Commission has procedures to address changes to existing tariffs or Commission policies on a prospective basis. If NYT believes such changes are necessary to address any reciprocal compensation matter, it should use those avenues. In the interim, we expect NYT to pay compensation to local exchange carriers for traffic delivered by NYT to the interconnecting carriers for termination to any Internet Service Providers, and to pay withheld compensation for any such previously delivered traffic.

Sincerely,

Allan Bausback

Allan Bausback
Acting Director
Communications Division

cc: Maureen Swift, ACC
Leo Maese, Cablevision
Alex J. Harris, MFS
Robert Marcier, TCG
Michael W. Fleming
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Cherie R. Kiser
Gina M. Spade
Keith J. Roland
Dan M. Martin
Paula Adams
Susan M. Narkewicz
Elaine H. Bartley

NYNEX
222 Bloomingdale Road, White Plains, NY 10605
Tel 914 644 4758
Fax 914 681 0902

Patrick A. Garzillo
Managing Director, Local Carrier Markets

NYNEX

April 15, 1997

Thomas E. Allen
Vice President, Strategic Planning & Regulatory Policy
Intermedia Communications Corp.
450 Franklin Road Suite 170
Marietta GA 30067

Dear Thomas:

NYNEX has been receiving bills seeking reciprocal compensation for traffic that is being delivered to Internet Service Providers ("ISPs"). It is our view that such traffic is interstate in nature and not eligible for reciprocal compensation under the FCC's rules.

NYNEX is conducting a study to determine the number of minutes that were delivered to ISPs in February of this year. Once this study is completed, we will then ask that you issue us a credit for any reciprocal compensations bills that we have already paid. If our study shows that you delivered Internet traffic to us, we will issue an offsetting credit. In addition, we would like you to agree that neither of us will include Internet traffic in future bills for reciprocal compensation.

Please confirm your agreement by signing the enclosed copy of this letter. If we cannot reach an agreement, NYNEX will withhold payment of reciprocal compensation bills pending resolution of this issue. We hope that will not be necessary.

If you have any questions, I will be glad to discuss this matter further with you.

Sincerely,

PA Garzillo
(A)

Agreed to:

Larry B. Cooper
General Manager-
Competitive Provider
Account Team

Southwestern Bell Telephone
One Bell Plaza
Suite 0525
Dallas, Texas 75202
Phone 214 464-8145
Fax 214 464-1486

[REDACTED]

June 9, 1997

Mr. Edward Cadieux
Director, Regulatory Affairs - Central Region
Brooks Fiber Properties
425 Woods Mill Road South,
Suite 300
Town and Country, MO 63017

RE: Local Terminating Compensation for Delivery of Internet Service Provider Traffic

Dear Mr. Cadieux:

The purpose of this letter is to address local terminating compensation for the delivery of traffic destined for internet service providers (ISPs).

Originating access to an ISP is accomplished by the ISP's subscribers dialing a seven digit telephone number which local exchange carriers route through their switching networks to the ISP's premises. The ISP often uses special access circuits to transport this originating interexchange access traffic to a distant location.

The FCC has found, and the courts have agreed, that the jurisdiction of traffic is determined by the end-to-end nature of a call. In paragraph 28 of the FCC's *Order Designating Issues for Investigation* in CC Docket No. 88-180, released April 22, 1988, the FCC disagreed with an argument by Southwestern Bell that 800 credit card traffic terminated at the IXC's credit card switch for jurisdictional purposes. The FCC stated that the switching performed at a credit card switch was an intermediate step in a single end-to-end communication. It is the ultimate destination that must be used to jurisdictionalize a call. In the *NARUC vs. FCC* decision issued October 26, 1984, (746 F.2d 1492), the court found that even the use of facilities that are wholly within an exchange may be jurisdictionally interstate as a result of the traffic that uses them.

The FCC provided ISPs, insofar as they are also enhanced service providers, with an access charge exemption that permits ISPs to use local exchange services in lieu of access services to receive originating interstate calls (and to terminate interstate calls to the extent this functionality is required). The use of local exchange services by an ISP does not change, in any way, the jurisdiction of the originating interstate traffic transported over these services to the ISP's premises. In other words, this originating interstate access traffic does not become "local traffic" simply because the FCC permits an ISP to use business local exchange service as its exchange access service.

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In paragraph 1034 of its *Local Competition Order* in CC Docket No. 96-98, released August 8, 1996, the FCC stated that the reciprocal compensation provisions of section 251(b)(5) would only apply to local traffic as defined by the state commission (paragraph 1035). Further, the FCC specifically ruled that reciprocal compensation did not apply to interstate or intrastate interchange traffic. As such, Southwestern Bell/Pacific Bell will not request, nor will it pay, local terminating compensation for interstate or intrastate interchange traffic. This includes calls passed to ISPs pursuant to local interconnection agreements since this traffic is jointly provided originating interchange access. This decision satisfies the spirit and intent of the Telecommunications Act of 1996 and is consistent with the provisions of local interconnection agreements.

If you would like to discuss this matter further, I can be reached on 214-464-8145 or you may call your account manager, Sharon McGee, on 214-464-8147.

Sincerely,



cc: Sharon McGee